



SO ORDERED.

SIGNED this 04 day of November, 2004.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

BRYAN LEE KOEHLER,

DEBTOR.

MARY E. MAY,

United States Trustee,

PLAINTIFF,

v.

BRYAN LEE KOEHLER,

DEFENDANT.

CASE NO. 02-16230-7

CHAPTER 7

ADV. NO. 03-5108

**MEMORANDUM OF DECISION DETERMINING THAT PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED**

This proceeding is before the Court on the plaintiff's motion for summary judgment. Plaintiff Mary E. May, the United States Trustee for the District of Kansas,

appears by counsel Jeffrey W. Rockett. The defendant-debtor appears by counsel Stan M. Kenny. The Court has reviewed the relevant materials and is now ready to rule.

The United States Trustee asks the Court to deny debtor Bryan Lee Koehler a discharge because, intending to hinder, delay, or defraud his creditors or the Chapter 7 trustee, he allegedly violated 11 U.S.C.A. § 727(a)(2)(A) by transferring or concealing property that he owned within one year before he filed his Chapter 7 bankruptcy petition, and because he allegedly violated § 727(a)(4)(A) by knowingly and fraudulently making a false oath in his bankruptcy case. After considering the circumstances here, the Court concludes that the plaintiff has not established her transfer or concealment claim, but has established that the Debtor's discharge must be denied based on the false oath claim.

FACTS

In response to the U.S. Trustee's motion for summary judgment, the Debtor admitted essentially all the facts alleged in the motion. The Court has supplemented those facts with some others drawn from pleadings filed in the main bankruptcy case. The Court will also note the Debtor's minor disputes with the U.S. Trustee's allegations.

The Debtor filed a Chapter 7 bankruptcy petition on December 16, 2002. As required by the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms, the Debtor also filed Schedules and a Statement of Financial Affairs ("Statement"), signing each under penalty of perjury to declare that the information they

contained was true and correct.¹ The Court notes that typed dates by the Debtor's signatures indicate that he signed the forms three days before they were filed. At the meeting of creditors required by § 341(a) of the Bankruptcy Code ("341 Meeting"), held late the following month, the Debtor testified under oath that the information on the Schedules and Statement was true and correct. He then admitted, though, that some amendments might be required. The plaintiff alleges that he indicated the amendments would only be to list additional claims and to adjust his income, but the Debtor does not remember stating those limitations. In response to a question from the Chapter 7 trustee, the Debtor revealed that he had engaged in at least one transaction that he should have reported on the Statement but did not. The next day, the Chapter 7 trustee examined the Debtor, as authorized by Bankruptcy Rule 2004 ("2004 Exam"), and discovered that other transactions had been omitted from the Statement and some assets had been omitted from the Schedules. About seven weeks after the 2004 Exam, the Debtor filed a pleading making numerous amendments to his Statement and Schedules ("Amendment").

In all, the Debtor has now conceded his Statement omitted the following information:

1. Questions 1 and 2 on the Statement ask debtors to report all income they have received for at least the two years just before they filed for bankruptcy. The Debtor failed to report an unspecified amount of income he had received from hauling and plumbing work he did during that time.

¹See Fed. R. Bankr. P. 1007(b)(1); Official Bankruptcy Forms 6 (Schedules A through J) & 7 (Statement of Financial Affairs); Fed. R. Bankr. P. 9009 (requiring use of Official Bankruptcy Forms, although appropriate alterations are allowed).

2. Question 3.a. asks debtors to list all payments they made to any creditor within 90 days before they filed for bankruptcy to the extent the creditor received a total of more than \$600. The Debtor's Statement had a box checked to indicate he had "None" of these to report. During the 2004 Exam, the Chapter 7 trustee discovered that the Debtor had failed to show payments to a bank with a lien on his semi-tractor, to another bank with a lien on his semi-trailer, and to his mother for rent. In the Amendment, he added to his answer to this question that he had paid the first bank \$1,500 in installment payments, the second bank \$1,200 in installment payments, his mother \$4,000 in building rent, taxes, and groceries, and an ex-wife \$1,062 in child support.²
3. Question 4.a. asks debtors to list all suits and administrative proceedings to which they are or have been a party within one year before filing for bankruptcy. The Debtor's Statement had the "None" box checked for this question, but his Amendment indicated, without specifying when, that an ex-wife had initiated a suit for indemnification pursuant to their divorce decree. That ex-wife's proof of claim includes a copy of a motion she filed in their divorce case in September 2002 that appears to be the matter referred to in the Amendment.
4. Question 7 asks debtors to list all gifts made within one year before their bankruptcy filing "except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member." The Debtor's Statement had the "None" box checked for this question. During the 2004 exam, the Debtor disclosed that he had cashed in a life insurance policy on his son for \$2,400 and in August 2002, gave the money to the son for college. He also testified that on Christmas Eve of 2002 (more than a week after he filed for bankruptcy), he gave each of his sons \$400. The Amendment says to add to his answer to question 7 that he cashed a life insurance policy and gave the \$2,400 proceeds to his son for college, and also that he "made holiday gifts to his children of \$400 each." Because the question asks only about gifts made before filing for bankruptcy, the

²The Court notes that the Debtor's mother would be an "insider" under § 101(31)(A) of the Bankruptcy Code, and payments to insiders within one year, not just 90 days, of his bankruptcy filing were supposed to be listed under question 3.b. The Amendment indicated the payments to the Debtor's ex-wife were for child support, so they probably constituted payments that should have been listed under question 3.b. as well. The U.S. Trustee mentioned that the payments to the Debtor's mother should have been reported under 3.b., but has not otherwise raised the insider question. The Court can resolve this proceeding without considering anyone's insider status, and will not mention it again.

conflict between his Amendment's suggestion the \$400 gifts were made before he filed and his testimony that he made them after leaves it unclear whether those gifts should have been included in his answer to question 7.

5. Questions 3 through 9 all ask debtors to list various types of transfers of their property, and then question 10 tells them to "List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case." Again, the Debtor's Statement had the "None" box checked. At the 341 Meeting, though, when asked, the Debtor admitted that he had sold a backhoe in October 2002 and said he had sold a camper in 2000. The next day, during the 2004 Exam, the Debtor testified: (1) the backhoe had a bad motor and he had sold it to a friend for \$500; (2) he had sold a camper in the spring of 2002 for \$2,500; and (3) he had sold a dump truck in early December 2002 for \$1,750. In the Amendment, the Debtor reported the sale of the backhoe for \$500 in October 2002, the sale of the dump truck for \$1,750 on December 14, 2002 (just two days before he filed for bankruptcy), and the sale of "an early 1980's camper" for \$2,500, without specifying the time of the sale. The Court also notes that the Debtor probably should have reported here cashing in the insurance policy on his son, rather than in response to question 7, the place he included it in the Amendment.
6. Question 12 asks debtors to list each safe deposit box in which they store or had stored valuables within one year before filing for bankruptcy. The Debtor's Statement listed one box, and described the contents as "Coins—approximate value \$10.00." During the 2004 exam, the Debtor testified that the box contained abstracts, a two-dollar bill, and a silver dollar. The Amendment said to add to the contents of the box a two-dollar bill and abstracts to property he no longer owned.
7. Question 14 asks debtors to list all property owned by another person that they hold or control. The Debtor's Statement had the "None" box checked for this question. During the 2004 exam, the Debtor revealed that he had a number of items at his business location that he held for other people, testifying that he had his brother's tractor, a friend's jet-ski, and two cars and a boat owned by his mother. The Amendment reported the property differently. One of the cars and the boat that he had testified his mother owned were reported to belong to his brother, along with the tractor, while

the other car was still reported to belong to his mother. The Amendment added a “trencher” and a pickup truck to the property owned by his mother. It also added “some wheels and tires” to the jet-ski held for his friend.

8. Question 18 asks debtors who are individuals to give a variety of information about any businesses in which they held certain positions or ownership interests within six years before filing for bankruptcy. The Debtor’s Statement had the “None” box checked. Although it is not clear how this information was disclosed — probably during the 2004 Exam — the Debtor had operated a convenience store within six years before filing. His bankruptcy schedules indicated he had been self-employed in an unspecified capacity for eight years before filing. Although the Court has not been advised how these facts were discovered, the Debtor’s self-employment was as an independent truck driver, and the parties agree he was “unemployed” when he filed for bankruptcy. Since he reported monthly business income and expenses, and still had his semi-tractor and semi-trailer when he filed, the Court is uncertain what the parties mean when they say he was “unemployed.”

The Debtor has conceded that his Schedules had problems, too. Most of these problems revolve around Schedule B, on which debtors are to report “all personal property . . . of whatever kind” they own when they file for bankruptcy. Thirty-two categories of property are specified, and a thirty-third category is included for reporting any other property. The Debtor’s Amendment added several items to his Schedule B, but did not indicate which category he thought any of them belonged in.

9. Category 2 is for accounts at banks and other financial institutions. The Debtor reported that he had \$50 in a bank account, but his bank statement showed the account balance was actually \$1,626.14 on the day he filed for bankruptcy. In his brief, he suggests this difference was because checks he had written had not yet cleared the account, but no evidence has been submitted to support this assertion. In the Amendment, he indicated his bank account was at a different bank than the one listed in his Schedules.

10. Category 7 is for furs and jewelry. The Debtor's Schedule B had an "X" in the column to report "None" for this category. The Amendment added a class ring of an undetermined value.
11. Category 8 is for firearms and hobby equipment. The Debtor's Schedule B had an "X" in the column to report "None" for this category. In the Amendment, he reported that he had a shotgun worth \$100.
12. Category 23 is for cars, trucks, and other vehicles and accessories. The Debtor listed a "1988 Chevrolet," a semi-tractor, and a semi-trailer. During the 2004 Exam, he indicated he needed to change the identification of the pickup truck shown on Schedule B; the Amendment said to delete the "1988 Chevrolet" and add a "1984 Chevrolet S-10 pick up." Nothing presented to the Court explains why this change was necessary. The Amendment also said to add a "[s]mall semi-trailer, \$400; [and] axles for semi-trailer, \$100," items that would appear to fall in this category.
13. Category 27 is for machinery, equipment, and other property used in business. The Debtor's Schedule B listed "[m]iscellaneous shop and hand tools" worth \$2,000. During the 2004 Exam, the Debtor conceded he owned a "trencher." He now suggests he thought this item was included in the miscellaneous shop and hand tools. No other information presented to the Court explains what the "trencher" is. The Amendment increased the value of the tools to \$4,500, but did not change their description and did not try to add a "trencher" to Schedule B. Nothing presented to the Court makes clear whether this trencher is a different one than the one that the Debtor reported in the Amendment he was holding for his mother.
14. Category 33 is for any other property not already listed. The Debtor's Schedule B had an "X" in the column to report "None" for this category. His Amendment added a riding lawn mower, an item that does not appear to fit in any of the more specific categories, and gave two values for the mower, \$1,000 at one point and \$250 at another.
15. During the 2004 Exam, the Debtor testified that he had a safe at his home in which he kept the class ring, a roll of pennies, and the keys to his safe deposit box. His Amendment did not add the pennies to his reported property.

There were problems with many of the Debtor's other Schedules as well, some of which were not fully resolved by his Amendment.

16. On Schedule C, debtors are to specify which of their property they claim as exempt. The Debtor's Schedule C listed his homestead, a bank account, a savings account, the 1988 Chevrolet, and the miscellaneous shop and hand tools, valuing the latter at \$2,000. The Amendment changed his vehicle to the 1984 S-10 pickup, and increased the value of the tools he claimed as exempt to \$4,500. The Amendment also tried to add to his exemptions the class ring, the contents of his safe deposit box, the small semi-trailer, the axles, and the riding lawn mower, but did not make clear the grounds on which he claimed any of these items were exempt.
17. On Schedule F, debtors are to list all their unsecured creditors whose claims are not entitled to priority. The Debtor's Schedule F listed only three, owed a total of \$45,133.31. At the 2004 Exam, he indicated he might need to amend his schedules to add some creditors. The Amendment added nine new creditors to Schedule F, owed a total of \$73,134. Almost \$57,000 of this added debt was owed to one of the new creditors.
18. On Schedule G, debtors are supposed to list any executory contracts and unexpired leases they have. The Debtor's Schedule G had the "None" box checked, although he reported elsewhere that he had a monthly rent or home mortgage payment expense, and a monthly business rent expense. The Amendment reported that the Debtor had an oral lease with his mother to rent a storage building.
19. Debtors are to report their current monthly income and expenses on Schedules I and J, separating their personal ones from those for their business, if any. Because he was self-employed (and despite the parties' agreement that he was unemployed when he filed for bankruptcy), the Debtor supplemented these Schedules with a report of his business income and expenses. On this report, he indicated he expected his future monthly business expenses would include no net employee payroll, no payroll taxes, no unemployment taxes, and no worker's compensation, but would include "other taxes" of "\$3,022.35." During the 2004 exam, the Debtor could not explain this expense. In the Amendment, he declared, "The amount for taxes owed is undetermined at this time. Debtor is in the process of preparing all required returns." Nothing in the income and expense

Schedules indicates that the Debtor was unemployed when he filed for bankruptcy.

20. Although he reported in his Schedules that he owned his home and it was unencumbered, in his report of current expenditures (Schedule J), the Debtor listed a monthly rent or home mortgage obligation of \$300. In the report of his business income and expenses, he listed a monthly rent expense of \$500. In his Amendment, though, he said he was amending his Schedule J to show that he “does not have a rent payment.” Because he also disclosed in the Amendment that he had the oral storage building lease with his mother, this seems to mean that his report of a \$300 rent or home mortgage obligation among his personal expenses was false, and that his \$500 monthly business rent obligation was for the lease with his mother.

The Debtor indicated on his bankruptcy petition that he expected no money to be available to distribute to unsecured creditors in his case, but the Chapter 7 trustee was able to recover about \$4,300 for the bankruptcy estate, almost \$2,800 of which was distributed to unsecured creditors. The trustee obtained an uncontested order for the Debtor to turn over the amount that had been in his bank account when he filed for bankruptcy, and reached an agreement with the Debtor to pay that money over time. The trustee objected to the new exemptions the Debtor claimed in the Amendment, and obtained \$1,000 from the Debtor to settle that objection. Finally, the trustee obtained \$1,500 in a settlement with the Debtor’s mother; the amount of the settlement appears in the trustee’s final report, but no further information about it appears in the court file.

The Court notes that the plaintiff failed to support the statement of facts contained in her summary judgment motion as required by this District’s local rules.³ For example,

³D. Kan. Local Bankr. R. 7056.1(a) & (c).

no record of the 341 meeting or the 2004 Exam was supplied to support assertions about the Debtor's testimony on those occasions. This shortcoming was remedied, however, when the Debtor admitted essentially all the plaintiff's allegations about his testimony. In turn, the Debtor failed to submit any affidavit to support his claims of innocent intent, as is also required by the rules of procedure.⁴ The Court could ignore the Debtor's protestations about his innocent intent, but need not here because, as will be explained below, the evidence to the contrary on the plaintiff's false oath charge is overwhelming.

DISCUSSION

The U.S. Trustee brought this proceeding to try to prevent the Debtor from obtaining a discharge of his debts in his bankruptcy case, alleging two grounds for denying the discharge. In response to the plaintiff-Trustee's motion for summary judgment, the Debtor has conceded that he failed to include in his Statement and Schedules a variety of information about his assets, and financial dealings and circumstances. His explanation for this failure seems to be that he did not understand he was required to disclose the information, and that none of the information was material.

a. Summary judgment standards

Under the applicable rules of procedure, the Court is to grant summary judgment if the moving party demonstrates that there is "no genuine issue of material fact" and that

⁴See Fed. R. Civ. P. 56(e), made applicable by Fed. R. Bankr. P. 7056; D. Kan. Local Bankr. R. 7056.1(c).

the party “is entitled to a judgment as a matter of law.”⁵ The substantive law identifies which facts are material.⁶ A dispute over a material fact is genuine when the evidence is such that a reasonable fact finder could resolve the dispute in favor of the party opposing the motion.⁷ In adjudicating disputes, bankruptcy courts usually fulfill both the judicial function and the fact-finding function. In deciding a summary judgment motion, though, the Court is limited to its judicial role, not weighing the evidence and resolving factual disputes, but merely determining whether the evidence favorable to the non-moving party about a material fact is sufficient to require a trial⁸ at which the Court would act in its fact-finding role. Summary judgment is inappropriate if an inference can be drawn from the uncontroverted facts that would allow the non-moving party to prevail at trial.⁹

The substantive law’s allocation of the burden of proof also affects the Court’s analysis of a summary judgment motion. The party asking for summary judgment has the initial burden of showing that no genuine issue of material fact exists.¹⁰ But if the moving party does not have the burden of proof on a question, this showing requires only pointing out to the Court that the other party does not have sufficient evidence to support a finding

⁵Fed. R. Civil P. 56(c), made applicable by Fed. R. Bankr. P. 7056.

⁶*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁷*Id.*

⁸*Id.* at 249-52.

⁹*Id.* at 248.

¹⁰*Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

in that party's favor on that question.¹¹ When such a showing is made, the party with the burden of proof must respond with affidavits, depositions, answers to interrogatories, or admissions sufficient to establish that a finding on the question could properly be made in the party's favor at trial.¹²

As a general rule, questions involving a person's intent or other state of mind cannot be resolved by summary judgment.¹³ But in an exceptional case, a person's "denial of knowledge may be so utterly implausible in light of conceded or irrefutable evidence that no rational person could believe it," making a trial on the question of the person's state of mind unnecessary.¹⁴ Both of the plaintiff's claims against the Debtor involve questions about his intent.

b. Fraudulent transfer or concealment of property under § 727(a)(2)(A).

The plaintiff contends that summary judgment is proper under § 727(a)(2)(A) of the Bankruptcy Code, which provides:

(a) The court shall grant the debtor a discharge, unless—

¹¹*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

¹²*Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

¹³*Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980), *cert. denied* 451 U.S. 984 (1981); *see also* 10B Wright, Miller & Kane, *Fed. Prac. & Pro. Civil 3d*, §2730 (1998) (indicating actions involving state of mind can rarely be determined by summary judgment, except when the opposing party does not present sufficient circumstantial evidence to support a potential finding contrary to the person's professed state of mind).

¹⁴*In re Chavin*, 150 F.3d 726, 728-29 (7th Cir. 1998).

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred . . . or concealed, or has permitted to be transferred . . . or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition. . . .

The plaintiff must establish by a preponderance of the evidence that the Debtor violated this provision.¹⁵ The Court must find actual intent to hinder, delay, or defraud a creditor, proven either by direct evidence or by inference from the facts and circumstances of the Debtor's conduct.¹⁶ In the motion, the plaintiff contends that the sales of the dump truck and the backhoe, the failure to disclose those transfers on the Statement, and the failure to list the trencher on the Schedules constitute violations of this provision. The Debtor concedes that he sold the dump truck and the backhoe, and failed to disclose the transfers, but argues that he thought the trencher was included in the non-specific group of shop and hand tools he listed on his Schedules. The Debtor has not admitted, though, that he acted with the required intent about any of these matters.

The Court will first consider whether the plaintiff has established that the Debtor concealed the trencher by not listing it on his Schedules. The plaintiff has presented no evidence to show what the “trencher” is or what it might be worth. The word “trencher” might suggest a fairly large, motorized machine that is used to dig trenches, but the

¹⁵*First National Bank v. Serafini (In re Serafini)*, 938 F.2d 1156 (10th Cir. 1991) (standard of proof under 727(a)(2) is preponderance of evidence, not clear and convincing).

¹⁶*First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342-43 (9th Cir. 1986); *Korte v. United States (In re Korte)*, 262 B.R. 464, 472-73 (8th Cir. BAP 2001); *Reese v. Kulwin (In re Kulwin)*, 187 B.R. 341, 346 (Bankr. D. Kan. 1995), *vacated pursuant to parties' settlement* 208 B.R. 229 (Bankr. D. Kan. 1997) (citing *Fox v. Schmit (In re Schmit)*, 71 B.R. 587, 590 (Bankr. D. Minn. 1987)).

Debtor's response suggests his trencher is some kind of shop or hand tool that he considered to be included in the listing of "[m]iscellaneous shop and hand tools." The plaintiff has given the Court no way to evaluate whether the Debtor might actually and reasonably have thought the trencher was covered by that listing. For all that has been presented, the trencher could be some kind of hand-operated shovel, a simple wooden handle with a piece of metal attached to one end that is used to dig trenches. Clearly, the plaintiff has not yet established that the Debtor concealed the trencher at all, much less that he did so with fraudulent intent.

The Court now turns to the question of the Debtor's intent in selling the dump truck and backhoe, and failing to report their sales in his Statement. The plaintiff has presented no direct evidence of the Debtor's intent. To grant the part of the plaintiff's motion based on these items, then, the Court would have to be convinced, based on inferences supported by the admitted facts, that a reasonable fact finder could only conclude that the Debtor made these prepetition transfers or concealed the transfers with the intent to hinder, delay, or defraud a creditor or the Chapter 7 trustee.

People rarely admit that they acted with fraudulent intent, so over the years, under a variety of statutes, courts have identified various types of debtor conduct, typically referred to as "badges of fraud," that suggest the debtor intended to hinder, delay, or defraud a creditor.¹⁷ Here, the established badges are: (1) the backhoe transfer was to a

¹⁷See 5 *Collier on Bankruptcy*, § 548.04[2][b] (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2004); 6 *Collier on Bankruptcy*, § 727.02[3][b]; *Taylor v. Rupp (In re Taylor)*, 133 F.3d 1336, 1338-39

friend (who might qualify as an “insider”); (2) the backhoe and dump truck transfers were concealed; (3) the Debtor was insolvent before or became insolvent shortly after the backhoe and dump truck transfers occurred; and (4) before the Debtor made the transfers, one of his ex-wives had asserted a claim in their divorce case to recover \$40,000 from him. On the other hand, so far as the materials presented show, other badges of fraud have not been shown to exist. The value of the backhoe and dump truck might have been equal to the amount the Debtor sold each of them for. When he filed for bankruptcy after making the transfers, the Debtor reported that he still had \$55,150 worth of property, so they do not appear to have been a substantial portion of his assets. In addition, the sale prices were relatively small — \$500 and \$1,750 — compared to the total value of the property the Debtor listed in his Schedules.

So the plaintiff has established that some badges of fraud exist for the backhoe and dump truck sales, and for the Debtor’s concealment of the transfers. But the Court does not believe the plaintiff has shown that this is the exceptional type of case where a reasonable fact finder could only conclude that the Debtor made the transfers or concealed them with the intent to hinder, delay, or defraud a creditor or the Chapter 7 trustee. Consequently, summary judgment on the claim under § 727(a)(2)(A) is not appropriate.

c. False oath under § 727(a)(4)(A).

(10th Cir. 1998) (quoting “badges of fraud” listed in Utah version of Uniform Fraudulent Transfer Act, and stating similar considerations can show fraudulent intent under § 548(a)(1) of Bankruptcy Code).

The plaintiff also contends that the Debtor violated § 727(a)(4)(A), because he “knowingly and fraudulently, in or in connection with the case — (A) made a false oath or account.” To be covered by this provision, a false oath must be material, which means it must concern the existence and disposition of the Debtor’s property, or his personal and business financial transactions during certain relevant periods.¹⁸ In *Boroff v. Tully (In re Tully)*,¹⁹ after noting that the statutory right to a discharge must be liberally construed in favor of debtors, the First Circuit explained the need for debtors to disclose their financial circumstances:

On the other hand, the very purpose of certain sections of the law, like 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. As we have stated, “[t]he successful functioning of the bankruptcy act hinges both upon the bankrupt’s veracity and his willingness to make a full disclosure.” [In re] Mascolo, 505 F.2d [274,] 278 [(1st Cir. 1974)]. Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight. [Citations omitted.]²⁰

The discharge of debts in bankruptcy is extraordinary relief, and a substantial part of the price debtors must pay to get it is to fully disclose their financial circumstances.

As in other situations involving claims of fraud, because a debtor is unlikely to admit that he or she acted with fraudulent intent in failing to disclose or giving false

¹⁸See *Job v. Calder (In re Calder)*, 907 F.2d 953, 955 (10th Cir. 1990).

¹⁹818 F.2d 106 (1st Cir. 1987).

²⁰*Id.* at 110.

information, the fraudulent intent required by § 727(a)(4)(A) may be shown by circumstantial evidence, or by inferences drawn from a course of conduct.²¹ A discharge should not be denied, though, for a false statement resulting from inadvertence or an honest error, and the fact a debtor comes forward of his or her own accord with the omitted information is strong evidence he or she had no fraudulent intent.²² On the other hand, a debtor's reckless disregard for the truth of the information supplied on the Statement and Schedules or in testimony — that is, not caring whether the information is true or false — amounts to fraudulent intent under § 727(a)(4)(A).²³ As explained above, questions of a person's intent ordinarily cannot be resolved by summary judgment,²⁴ but in an exceptional case, the person's assertion of innocent intent may be “so utterly implausible in light of conceded or irrefutable evidence that no rational person could believe it,”²⁵ making a trial on the intent question unnecessary.

²¹*Calder*, 907 F.2d at 955-56.

²²*Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294-95 (10th Cir. 1997).

²³*In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (for purposes of bankruptcy discharge, “reckless disregard” — meaning not caring whether representation is true or false — is equivalent of knowing that representation is false and material); *Tully*, 818 F.2d at 112 (under § 727(a)(4)(A), reckless indifference to truth consistently treated as functional equivalent of fraud); *The Cadle Co. v. King (In re King)*, 272 B.R. 281, 302-03 (Bankr. N.D. Okla. 2002) (same); *see also* 6 *Collier on Bankruptcy* ¶727.04[1][a] at 727-40 (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2004) (reckless disregard of serious nature of information sought and required attention to detail and accuracy in answering may rise to level of fraudulent intent, though ignorance or carelessness is not enough).

²⁴*Prochaska v. Marcoux*, 632 F.2d at 851; *see also* 10B Wright, Miller & Kane, *Fed. Prac. & Pro. Civil 3d*, §2730.

²⁵*Chavin*, 150 F.3d at 728-29.

In this case, the plaintiff relies on the Debtor's signatures on the Statement and Schedules, declaring under penalty of perjury that the information they contained was true and correct, on his testimony at the 341 Meeting that the same information was true and correct, and on his failure at the 2004 Exam to correct much of that erroneous information until he was asked about specific items. The Debtor has admitted essentially everything the plaintiff has alleged about the false responses included in his Statement and Schedules, and about the information omitted from them. His only explanation for the errors and omissions seems to be that they concerned minutiae that debtors cannot be expected to remember to disclose, that he could not be expected to understand that they were matters the questions on the Statement and Schedules were asking him to reveal, and that he had no intent to conceal anything or to mislead the trustee or his creditors.

The plaintiff's allegations and the Debtor's admissions establish that the Debtor's Statement and Schedules contained a number of errors and omitted much of the information he was supposed to include. While some of the items the Debtor failed to disclose — the two-dollar bill and the roll of pennies, for example — would accurately be described as "minutiae" (minute or minor details),²⁶ most of the items, transactions, and other matters he omitted from his schedules cannot. Unlike many debtors who try to explain away such omissions, the Debtor has not asserted that he did not read the Statement or Schedules before he signed them, that some emergency forced him to

²⁶See *Webster's New Collegiate Dictionary* 733 (G. & C. Merriam Co. 1975).

complete them hurriedly and without considering the forms carefully, or that his reading ability is limited. The Debtor suggests instead that he simply could not be expected to know that *any* of the information he omitted was supposed to be included on these documents, a suggestion that the Court finds to be utterly implausible.

A review of the questions and instructions on the Statement, coupled with consideration of the information that the Debtor reported and that he omitted, shows the following to be the most egregious errors the Debtor made on that form.

Question 3.a. on the Statement reads: “List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than \$600 to any creditor, made within **90 days** immediately preceding the commencement of this case.” Despite being a self-employed truck driver with separate liens on his semi-tractor and semi-trailer, the Debtor failed to list \$1,500 he paid to the tractor-creditor and \$1,200 he paid to the trailer-creditor during that time. The Debtor also failed to list \$4,000 he paid to his mother for building rent, taxes, and groceries, and \$1,062 he paid to an ex-wife for child support during that period. Even if the question might not immediately call the latter payments to mind for all debtors, it certainly should make any debtor think of the monthly payments made on vehicles he or she uses to earn a living.

Question 7 on the Statement reads: “List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual

family member and charitable contributions aggregating less than \$100 per recipient.”

Four months before he filed for bankruptcy, the Debtor gave \$2,400 he had obtained by cashing in a life insurance policy to his son for college, but failed to list it here. The

Court is not certain that everyone reading this question would realize that it required reporting this gift, but is convinced that the Debtor should have realized that cashing in the insurance policy had to be reported, either here or elsewhere on the Statement.

Because it is unclear whether the Debtor made the \$400 holiday gifts to his sons before or after he filed for bankruptcy, the Court is giving their omission no weight in considering the plaintiff’s summary judgment motion.

Question 10 on the Statement reads: “List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case.” In the spring before his December bankruptcy filing, the Debtor sold a camper for \$2,500, in October, he sold a backhoe for \$500, and just two days before he filed, he sold a dump truck for \$1,750; he listed none of these in response to this question. The ordinary-course clause in this question might be somewhat confusing for debtors, but they should ask their attorneys to explain it to them. While it might be somewhat understandable to forget to report a transaction that took place many months before a debtor’s bankruptcy filing, such an explanation becomes less and less plausible as the time before the filing decreases, and is simply unbelievable for a sale that

occurred within a few days of the filing. Because the Debtor may have signed the Statement and Schedules three days before they were filed and he reported that the sale of the dump truck took place two days before his filing, the omission of the dump truck sale might be explained as not having occurred yet when he signed the documents; of course, if that is true, the dump truck should have been— but was not — included on Schedule B, the list of the Debtor’s personal property. In addition, the Court notes that the Debtor omitted all three of the non-ordinary-course property transfers that he made during the year before he filed for bankruptcy. This is not a case of a debtor who reported a large number of substantial transfers and failed to report only a small number of much more minor ones. The Debtor simply failed to report any of the three transfers that he had made.

Question 14 on the Statement reads: “List all property owned by another person that the debtor holds or controls.” This question is straightforward, and leaves little room for misunderstanding. But the Debtor failed to report that he had at his business two cars, a pickup truck, a tractor, a boat, a jet-ski, and a few smaller items that were owned by his mother, his brother, and a friend. A failure to report one or two minor items might be understood, but here a variety of substantial items were all omitted. Even brief consideration of the question should have made the Debtor think of at least some of these items.

The Debtor's Schedules also contained egregious errors. On Schedule B, debtors are directed to list "all personal property . . . of whatever kind" under 33 categories. Category 8 is "Firearms and sports, photographic, and other hobby equipment." The Debtor failed to list a shotgun here, and disclosed it only when he filed the Amendment. Category 23 is "Automobiles, trucks, trailers, and other vehicles and accessories." Until he filed the Amendment, the Debtor failed to list a "small" semi-trailer and axles for a semi-trailer. He also initially listed a "1988 Chevrolet" but in the Amendment, deleted that vehicle and added a "1984 Chevrolet S-10 pickup"; he has offered no explanation for this change. Category 33 is "Other personal property of any kind not already listed." No other category appears to cover a riding lawn mower, and the Debtor failed to reveal that he had one until he filed the Amendment. Even in the Amendment, he indicated at one point that the mower was worth \$1,000, and at another that it was worth \$250. Schedule F directs debtors to "State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of the filing of the petition." In his Schedule F, the Debtor listed only three creditors, owed a total of just over \$45,000; in the Amendment, the Debtor added nine more creditors, owed a total of just over \$73,000, including a single one owed almost \$57,000. Schedule G asks debtors to "Describe all executory contracts of any nature and all unexpired leases of real and personal property." The Debtor answered "None" on his Schedules, but revealed in the Amendment that he

had an oral lease with his mother for a storage building. Schedule J instructs debtors to “Complete this schedule by estimating the average monthly expenses of the debtor and the debtor’s family.” The first expense to be reported is for “Rent or home mortgage payment (include lot rented for mobile home).” The Debtor had reported on Schedule A that he owned his home and that there was no secured claim against it, but in Schedule J, he listed \$300 in the rent or home mortgage payment space. Further down on Schedule J, debtors are directed to report “Regular expenses from operation of business, profession, or farm (attach detailed statement).” On his statement of business expenses, the Debtor reported a \$500 expense for “Rent (Other than debtor’s principal residence).” Then, in the Amendment, he reported that he “does not have a rent payment,” apparently meaning to delete the \$300 expense he had reported for rent or a home mortgage payment.

As this recital makes clear, the Debtor’s Statement and Schedules contained a variety of false oaths that created a false impression of his financial circumstances, and forced the Chapter 7 trustee to “engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.”²⁷ His testimony at the meeting of creditors repeating that the Statement and Schedules were true and correct was similarly false. For most of the misinformation, the Debtor revealed the truth only when specifically asked about the matter. At best, these extensive false oaths show that the Debtor had a reckless disregard for the truth of the information he provided in his Statement and Schedules; at worst, they

²⁷*Tully*, 818 F.2d at 110.

show a deliberate effort to hide his property and his true financial situation from his creditors and the Chapter 7 trustee. It is not as though the Debtor reported a large number of substantial assets or significant transactions, and omitted just a few minor ones. He omitted a variety of assets and nearly all the transactions he was supposed to report. Given his apparent standard of living, almost all of the omitted information should have been significant to him. Under the circumstances, the Court is convinced that this is the exceptional kind of case where the Debtor's assertion that none of his false oaths were knowing and fraudulent is so implausible that no rational fact finder could believe it, and the assertion should be rejected in a summary judgment ruling.

In his brief, the Debtor further reveals his failure to appreciate his obligation to freely and fully disclose the information required to be reported on the Statement and Schedules. He suggests that his ex-wife may have provided the Chapter 7 trustee with information that revealed transactions and assets the Debtor failed to disclose, and that he is entitled to explore at trial the cause of the level of scrutiny applied in his case. But he has admitted the truth of the information the trustee discovered. What anyone told the trustee could be relevant at trial only if the Debtor were contesting the truth of the information supplied. The fact is, under the Bankruptcy Code, Rules, and Official Forms, the Debtor himself was required to be the source of all the information about his financial situation for the relevant periods. How the trustee discovered admittedly false oaths is simply not relevant to the only question that remains under § 727(a)(4)(A) — whether the

Debtor made the false oaths knowingly and fraudulently. The large number of significant matters involved in the false oaths and the Debtor's failure to offer any plausible explanation for them mean that question can only be answered, "Yes."

CONCLUSION

Both the plaintiff's claims in this proceeding seek the same relief, the denial of the Debtor's discharge. The plaintiff has not established that she is entitled to summary judgment on her claim under § 727(a)(2)(A), but has established that she is entitled to summary judgment on her claim under § 727(a)(4)(A). As a result, her motion must be granted. The Debtor's discharge will be denied because he knowingly and fraudulently made false oaths in connection with his bankruptcy case.

The foregoing constitutes a decision under Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56(c) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above MEMORANDUM OF DECISION DETERMINING THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED were mailed via regular U.S. mail, postage prepaid, on the _____ day of November, 2004, to the following:

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